Case Comments

A Threat to Ohio's Referendum: *State ex rel. Riffe v. Brown*

The power to repeal state laws by popular referendum[1] has been constitutionally guaranteed to the people of Ohio since the Constitutional Convention of 1912. The decision of the Ohio Supreme Court in *State ex rel. Riffe v. Brown*[2] however, has seriously threatened that right. The court held that an election day registration law,[3] which included several controversial provisions, was exempted from referendum in its entirety because it included an "appropriation for the current expenses of the state government"[4] that was not subject to referendum. This holding was reached despite the fact that the appropriation related only indirectly to the changes in election procedures on which a referendum was sought.[5]

Brown presents a significant question in Ohio constitutional law: May legislators circumvent the people's right of referendum on an unpopular law by including in it an "appropriation for the current expenses of the state government"? The holding in *Brown* answers this question in the affirmative. As a result, the right of referendum, guaranteed to the people of Ohio by the Ohio Constitution, is now subject to the control of the state legislature. This Case Comment will consider the background of the controversy surrounding the *Brown* decision and demonstrate that its holding is neither supported by precedent nor justified as a matter of public policy.

I. Ohio's Referendum

Traditional representative government functions through elected representatives who enact laws on behalf of the people. In contrast, the referendum and its counterpart, the initiative, are means of direct legislation. Through the initiative procedure,[6] individual citizens may propose laws and constitutional amendments that are submitted to the electorate at a general or special election for approval or rejection. The referendum, on the other hand, is essentially a popular veto. Within ninety days of the passage by the Ohio General Assembly of a

---

1. Ohio Const. art. II, § 1.
2. 51 Ohio St. 2d 149, 365 N.E.2d 876 (1977).
3. Am. Sub. S. B. No. 125, 1977 Laws of Ohio 5-38 (Baldwin 1977).
4. Ohio Const. art. II, § 1d.
5. The appropriation was the biennial budget of the office of the Secretary of State.
6. Ohio Const. art. II §§ 1a-1b.

law that includes an appropriation, interested persons may submit petitions to the Secretary of State demanding that the law be put to a vote of the people.[7] If a majority of the electors vote to reject the law, it will not be implemented. In order to avoid undue disruption of state government, however, the constitution provides for three exceptions to the referendum: "[l]aws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety."[8]

Ohio's constitutional provisions for initiative and referendum are a legacy of the Progressive Movement. Progressive delegates to the Constitutional Convention of 1912 were committed to the implementation of direct legislation. The initiative and referendum were seen as means of taking legislative power from a general assembly dominated by special interests and returning it to the people.[9] "Friends of the reform," a study of the Progressive Movement notes, "argued that the people of Ohio had lost faith in representative government because of the corruption and irresponsibility of the legislature and were determined to have a larger direct share in policy making through the initiative and referendum."[10]

II. THE *Brown* DECISION

A. *The Facts*

The *Brown* controversy stemmed from an apparent attempt on the part of legislative leaders to avoid a referendum on Ohio's election day voter registration law.[11] Considerable controversy surrounded the passage of the law because it provided for both election day registra-

---

7. *Id.* art. II, § 1c.

8. *Id.* art. II, § 1d.

9. VI C. WITTKE, THE HISTORY OF THE STATE OF OHIO 13 (1942).

10. H. WARNER, PROGRESSIVISM IN OHIO 1897-1917 321 (1964). The push for direct legislation drew national attention during the early part of the century. In a 1911 speech Woodrow Wilson said:

> If we felt that we had genuine representative government in our State legislatures, no one would propose the initiative and referendum in America. They are being proposed now as a means of bringing our representatives back to the consciousness that what they are bound in duty and in mere policy to do is to represent the sovereign people whom they profess to serve, and not the private interests which creep into their councils by way of machine orders and committee conferences.

Address by Woodrow Wilson in Kansas City (May 5, 1911) *reprinted in* J. KING, THE STATEWIDE INITIATIVE AND REFERENDUM S. DOC. No. 736, 64th Cong., 2d Sess. 5 (1917).

11. Justice Paul Brown, a dissenter in the *Brown* decision, was among those who believed that the leaders of the Ohio General Assembly had acted deliberately to avoid a referendum on election day registration. He charged that their action was a "legislative ploy designed by a present majority of the General Assembly to circumvent the people's power of referendum." State *ex rel.* Riffe v. Brown, 51 Ohio St. 2d 149, 168, 365 N.E.2d 876, 887 (1977) (Brown, J. dissenting).

tion[12] and permanent voter registration.[13] The law was enacted despite strenuous objection from the Secretary of State,[14] the state's chief election official, and over Governor Rhodes' line-item veto of significant portions.[15] Proponents of the law argued that it would significantly increase voter participation in Ohio elections.[16] Opponents insisted that it would lead to election fraud.[17]

As passed, the election reform law contained five sections. Four dealt in considerable detail with provisions for registering and voting in Ohio elections.[18] The fifth was a current appropriation for the expenses of the office of the Secretary of State. Opponents of the law charged that the appropriation was added as an amendment for the sole purpose of avoiding a referendum on election day registration.[19]

When the law was filed with his office, Secretary of State Ted W. Brown set two different effective dates for it.[20] Section five, the appropriation section, became effective May 27, 1977, the date the Governor signed it, because it was excepted from referendum as an "appropriation for the current expenses of the state government"[21] and hence was not subject to the ninety-day delay incident to the referendum. All other sections were to become effective August 30, 1977, ninety days after filing, because Secretary of State Brown considered them to be laws on which popular referenda could be held.

On June 6, 1977, Ohioans for the Preservation of Honest Elections, a group opposed to election day registration, filed a petition for referendum on the election day registration law with the Ohio Attorney General. Shortly thereafter, Vernal G. Riffe, Jr., Speaker of the Ohio House of Representatives, and Oliver Ocasek, President Pro Tempore of the Ohio Senate, filed a complaint in the Ohio Supreme Court against Secretary of State Brown. Their complaint prayed that " 'writs

12. Am. Sub. S. B. No. 125, 1977 Laws of Ohio 5-38 (Baldwin 1977). Section 3503.11 of the law provided for registration of qualified voters with proper identification at polling places on the day of an election.

13. *Id.* The election day registration law repealed all but the last paragraph of the existing election statute, OHIO REV. CODE ANN. § 3503.25 (Page 1975), which required cancellation of registration of any voter who did not vote in any two-year period. As a consequence of this repeal, a voter's registration cannot be cancelled for failure to vote.

14. Columbus Dispatch, Mar. 10, 1977, § A at 12, col. 1.

15. Columbus Citizen J., May 30, 1977, at 1, col. 3.

16. *E.g.*, League of Women Voters of Ohio, Statement on S.B. 125 (Apr. 28, 1977) (prepared for the Ohio House of Representatives Election Committee).

17. *E.g.*, Kurfess (Ohio House Minority Leader), *Legislator Feels Honest Elections Need Protecting*, Columbus Dispatch, Sept. 23, 1977, § B at 3, col. 1.

18. The law provides for amendment of thirty-five sections of the Ohio Revised Code, enactment of one new section and repeal of five sections. Among the reforms are a requirement for registration in all counties, registration by mail, registration by motor vehicle registrars, minimum hours for board of elections for registration and the establishment of a master list of registered voters, as well as election day and permanent registration.

19. *See* Columbus Citizen J., June 17, 1977, at 22, col. 1.

20. State *ex rel.* Riffe v. Brown, 51 Ohio St. 2d 149, 150, 365 N.E.2d 876, 877 (1977).

21. OHIO CONST. art. II, § 1d.

of mandamus and prohibition issue directing respondent [Secretary of State Brown] to advise all county boards of elections to give immediate effect to the election procedures mandated by Amended Substitute Senate Bill No. 125 [election day registration law] and prohibiting respondent from taking any further action to frustrate or deny implementation of such legislation.' "[22]

B. *The Court's Conclusion*

In *Brown* the Ohio Supreme Court was called on to reconcile conflicting language in the referendum provisions of Ohio's Constitution. Article II, section 1 of the constitution grants to the people the power to reject "any law, section of any law or any item in any law appropriating money." Section 1c, which outlines the referendum procedure, similarly refers to "any law, section of any law or any item in any law":

> 1c. Initiative and referendum (Cont.)
>
> The second aforestated power [set forth in section 1] reserved by the people is designated the referendum, and the signatures of six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of *any law*, *section of any law* or *any item in any law* appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided.[23]

In contrast to sections 1 and 1c, section 1d that provides for exceptions to the right of referendum refers only to "laws" and makes no mention of sections or items within laws:

> 1d. Emergency laws; not subject to referendum.
>
> Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. . . . The *laws* mentioned in this section shall not be subject to the referendum.[24]

Hence, the *Brown* court was presented with a question of constitutional interpretation: Does section 1d except from referendum laws only in their entirety, or does it also except sections and items of laws separately? That is, if a law contains several sections, one or more of which come within the exceptions named in section 1d (tax levies, appropriations for current state expenses and emergency laws) and one or more that do not come within the section 1d exceptions, is the entire law excepted from referendum or only that section of the law that comes within the section 1d exceptions?

22. State *ex rel.* Riffe v. Brown, 51 Ohio St. 2d 149, 149, 365 N.E.2d 876, 877 (1977).

23. OHIO CONST. art. II, § 1c (emphasis added).

24. *Id.* art. II, § 1d (emphasis added).

Both sides in *Brown* agreed that the appropriation section in the election day registration law was an "appropriation for the current expenses of the state government" within the meaning of section 1d and was therefore excepted from referendum.[25] The court was called on to decide whether, because no referendum could be had on the appropriation section, referenda on the other sections of the law were precluded. After consideration of relevant prior cases, the court concluded that when any section of a law comes within the exceptions stated in 1d, the entire law is excepted from the referendum. Thus, since a referendum could not be held on the appropriation section of the election day registration law, the sections providing for election day and permanent voter registration were also held to be excluded from referendum.

C. *Case Authority*

There is little reason to question the precedent relied on by the majority in *Brown*. The Ohio authority relating to the constitutional provision is sparse, but the cases cited are unquestionably relevant to the issues presented. The use the court made of these cases, however, is open to criticism. In a heated dissent, Chief Justice O'Neill charged that "the majority has necessarily overruled, ignored or improperly distinguished all previous case law."[26] A review of that law supports the criticism made by the chief justice and reveals that the court strained to reach a result opposite that supported by the cases it cited.

1. *State ex rel. Donahey v. Roose*

State ex rel. Donahey v. Roose,[27] a decision reached two years after the introduction of the referendum procedure, was relied on by the *Brown* court to support its holding that if one section of the law is excepted from referendum, all sections are excepted from it. Consideration of the *Roose* decision, however, shows that the case suggests an opposite result.

In *Roose*, State Auditor Donahey brought an action for a writ of mandamus to compel the auditor of Putnam County to place on the county tax lists and tax duplicate a tax passed by the Ohio General Assembly on April 8, 1913. John Roose, the County Auditor, refused. He argued that pursuant to article II, section 1c of the Ohio Constitution there is a ninety-day delay between the filing of a law with the Secretary of State and its effective date. "[T]he ninety days," he in-

25. 51 Ohio St. 2d at 152, 365 N.E.2d at 878.

26. *Id.* at 161-62, 365 N.E.2d at 883 (O'Neill, C.J., dissenting).

27. 90 Ohio St. 345, 107 N.E. 760 (1914).

sisted, "did not expire until the 13th day of August, 1913."[28] Therefore, "this levy did not attach as a lien upon the real and personal property of the state of Ohio for the year 1913."[29] It is evident from the opinion that Roose did not deny that "laws providing for tax levies" are excepted from referendum by article II, section 1d. Rather, his refusal to place the tax on the duplicate for the year 1913 was based on his belief that, because other sections of the law were not excepted from referendum, and were thus subject to a ninety-day delay, the effective date of the tax levy section of the law was likewise delayed for ninety days. The issue presented the court was whether, when a law contains both a section excepted from referendum and sections otherwise subject to referendum, the entire law is subject to the ninety-day delay. The court held that the tax levy was immediately effective. In doing so, however, it suggested that the other sections of the law might still have been subject to referendum:

> While perhaps some of the sections of this act may have been subject to the referendum provisions of Section 1*c* of Article II of the Constitution, yet Section 1*d* of Article II expressly exempts laws providing for tax levies from the operation of the preceding provision of the Constitution. Therefore section 1 of this act, providing for a tax levy of one-half mill on all taxable property within the state, went into immediate operation when approved and signed by the governor.[30]

This language, as the *Brown* majority insisted,[31] is probably obiter dictum. The *Roose* court held that the question of divisibility of laws for the purposes of referendum need not be decided because even though the tax levy did not go into effect until August 13, 1913, it could attach as a lien for the year 1913.[32] Nonetheless, the opinion is a contemporary interpretation of a constitutional provision and its assumptions went unchallenged for over sixty years. The language used indicated that the court believed that, when one section of a law comes within an exception to referendum provided for by section 1d, the law is divisible for purposes of referendum:

> The contention of counsel that an act containing some sections sub-

---

28. *Id.* at 347, 107 N.E. at 761.

29. *Id.* Roose's argument was based on § 5671 of the General Code, which provided that tax levies attach on the day preceding the second Monday of April each year. He contended that the tax levy did not meet that deadline because, although it was passed on April 8, 1913, it did not become effective until August 13, 1913. *Id.* at 351, 107 N.E. at 762.

30. *Id.* at 349, 107 N.E. at 761.

31. 51 Ohio St. 2d at 154, 365 N.E.2d at 879.

32.

> While Section 5671, General Code, fixes the date in each year that the lien of the state for taxes shall attach, yet it by no means follows that this requires that the tax levy shall be made on or before that date. . . . [I]t is clear that the amount of taxes is to be determined subsequently, and the assessment then relates back to the date at which the taxes became a lien.

90 Ohio St. at 351-52, 107 N.E. at 762.

> ject to the referendum will take effect only as a whole after the expiration of ninety days from the date it is filed in the office of the secretary of state, is not sustained by the provisions of Section 1*c* of Article II of the Constitution. That section of the constitution expressly authorizes a referendum upon any section of a law or any item of a law appropriating money. It follows that such sections of a law as are not subject to the referendum will go into immediate effect notwithstanding other sections or other items may be subject to the delay incident to a referendum or the right to petition therefore.[33]

Despite having dismissed this language in the *Roose* opinion, the *Brown* court relied on a restatement of it in the *Roose* syllabus, which states:

> Section 1*c* of Article II of the Constitution of Ohio expressly provides for a referendum not only upon any law but any section of a law. *All sections of a law not subject to the referendum provisions of this section of the constitution go into immediate effect when approved and signed by the governor.*[34]

Considered alone, the second sentence of this section of the syllabus is ambiguous. The phrase "not subject to the referendum" can have as its antecedent either "law" or "sections." The *Brown* court concluded that the phrase modified "law" and, therefore read the sentence as though it said "all sections of a law [*that is*] not subject to the referendum . . . go into immediate effect." Therefore, the court held:

> In our view, a law which is "not subject to the referendum provisions" of section 1c is a law of the nature set forth in Section 1d. One such law so mentioned is a law providing for "*** appropriations for the current expenses of the state government ***." Accordingly, pursuant to the foregoing paragraph of the *Roose* syllabus, "[a]ll [meaning, each and every] sections of a law not subject to the referendum provisions of *** section [1c] of the constitution go into immediate effect when approved and signed by the governor."
>
> As to other laws, which are not *laws mentioned in* Section 1d, but that may similarly be laws "appropriating money," such laws do not go into effect for 90 days and the referendum process of Section 1c is available. The sections and items of any laws thus subject to referendum are likewise, but severally or collectively, subject to referendum according to the express provisions of Section 1c. Inasmuch as a law mentioned in Section 1d, by the terms of that constitutional provision, is clearly ineligible for referendum, the sections, items or other parts of such law must necessarily share that constitutionally imposed disability.[35]

This reliance on the syllabus is not unreasonable in itself. In Ohio the syllabus, rather than the body of an opinion, is the law of the case.[36] The *Brown* majority, however, overlooked the fact that the

33. *Id.* at 349, 107 N.E. at 761.

34. *Id.* at 345, 107 N.E. at 760 (syllabus 2) (emphasis added).

35. 51 Ohio St. 2d 149, 154, 365 N.E.2d 876, 879-80 (1977).

36. SUP. CT. R. PRAC. VI. (Ohio), *construed in* State *ex rel.* Donahey v. Edmonson, 89

syllabus is to be read in light of the facts of the case.[37] When read in that light, it is clear that the *Roose* syllabus was misread by the *Brown* court. To be consistent with the language of the opinion, the statement in the syllabus that "[a]ll sections of a law not subject to the referendum . . . go into immediate effect" must be read as though it said "all sections of a law [*that are*] not subject to the referendum . . . go into immediate effect." As noted earlier, the wording used in the *Roose* opinion was "such sections of a law *as are* not subject to referendum will go into immediate effect notwithstanding other sections or other items may be subject to the delay incident to a referendum or the right to petition therefore."[38] Thus, the *Brown* court's interpretation of the *Roose* syllabus reaches a result opposite to that which the earlier court intended; that is, that sections of a law other than those excepted from referendum do not go into immediate effect and are subject to referendum.

It is worth noting that prior to *Brown*, commentators cited *Roose* for the proposition that laws are divisible for the purpose of referendum when they include a section excepted from referendum. Ohio's Attorney General Thomas J. Herbert was asked in 1943 for an opinion on the divisibility of a particular law for purposes of referendum. Citing *Roose*, he concluded that, while one section of the law in question came within the exceptions in section 1d and was therefore effective immediately, the other sections did not come within the exception provision and did not "become effective until after the expiration of the ninety day period permitted by the Constitution within which to subject such law to referendum."[39] Likewise, in a discussion of the initiative and referendum in another source, *Roose* was cited for the same proposition.[40]

2. *State ex rel. Davies Manufacturing Co. v. Donahey*

State ex rel. Davies Manufacturing Co. v. Donahey[41] was also relied on by the *Brown* majority. *Donahey* dealt with a law appropriating funds for the purchase of license plates by the state. As passed, the law provided for current appropriations and was therefore

Ohio St. 93, 105 N.E. 269 (1913). *See* Perkins v. Benguet Mining Co., 342 U.S. 437, 441-42 (1952).

37. Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 403 (1934).

38. 90 Ohio St. at 349, 107 N.E. at 761 (emphasis added).

39. 1943 OP. ATT'Y GEN. 6207 (Ohio 1943).

40. Annot., 146 A.L.R. 284, 288 (1943):

> A section of a statute which provides for a tax levy on all taxable property within the state, being, under express provisions of the Ohio Constitution, excepted from the referendum provision, goes into immediate operation when approved and signed by the governor, although other sections of the same act which are subject to referendum do not go into operation until the expiration of ninety days from the date it is filed in the office of the secretary of the state. It was so held in State ex rel. Donahey v. Roose . . . .

41. 94 Ohio St. 382, 114 N.E. 1037 (1916).

excepted from referendum. It was filed with the Secretary of State June 5th and considered to be effective as of that date. Included in the law, however, was a section requiring competitive bidding on all contracts funded by the appropriation. In a challenge to the effective date of the law, Davies Manufacturing Company argued that the competitive bidding provision in the law was subject to referendum and therefore not effective until ninety days after the law was filed.

The challenge arose because of a contract dispute between Davies Manufacturing Company and the state. On August 15th, Davies submitted a proposal to supply license plates to the state at nineteen and one quarter cents a pair. Upon acceptance of the proposal by the Secretary of the State, the company sublet the contract to another firm at fifteen cents a pair. State Auditor Donahey refused to pay for the tags at the higher rate. Instead, he issued a voucher in the amount of the subcontract price. He insisted that the state was not bound to pay the higher price because of the absence of competitive bidding on the contract. The court rejected Davies' argument that the requirement of competitive bidding in the law was subject to referendum and therefore did not take effect until after its proposal had been accepted. It held that all sections of the law became effective immediately because the law came within the exception to referendum for current appropriations. The opinion makes clear, however, that the court did not see the requirement of competitive bidding as a distinct section within the law, but rather as an integral and inseparable part of it.[42] The *Donahey* court stated: "[t]he appropriation in question was an appropriation for the current expenses of the state government, and the limitation with reference to competitive bidding was simply a condition under which an appropriation should be drawn."[43]

The *Brown* court characterized the holding of *Donahey* as follows: "[T]he appropriation Act, including the required competitive bidding provision, went into immediate effect and was not subject to a referendum under Section 1c, Article II of the Ohio Constitution."[44] Thus, according to the majority in *Brown*, *Donahey* stands for the principle that a law that includes any provision excepted from the referendum goes into immediate effect and no section of it is subject to referendum.

Chief Justice O'Neill, in his dissenting opinion in *Brown*, objected strongly to the majority's reading of *Donahey*. He pointed out that in *Donahey* the provision in dispute "consisted of 12 words buried in a

42. *See* Fordham and Leach, *The Initiative and Referendum in Ohio*, 11 OHIO STATE L.J. 495, 526 (1950), in which *Donahey* was said to hold that "[w]hile a capital outlay item in a general appropriation bill would be subject to referendum the court considered a condition attached to a current expense item a part, in effect, of that item."

43. 94 Ohio St. at 385, 114 N.E. at 1038.

44. 51 Ohio St. 2d at 155, 365 N.E.2d at 880.

168-page general appropriations Act."[45] The *Donahey* court, he said, "there concluded that a provision in an appropriation Act concerning competitive bidding was not a separable portion of the Act subject to referendum but that it was a 'condition under which the appropriation could be drawn.' "[46]

Only in a footnote did the *Brown* majority acknowledge that the *Donahey* court focused on the fact that the competitive bidding requirement was a condition on the appropriations made in the law.[47] Efforts to distinguish *Brown* and *Donahey* were rejected by the *Brown* majority:

> Respondent argues that the conditional influence of the competitive bidding provisions upon the law under review [in *Donahey*] required a decision that the provision was not subject to referendum. Whether such a fine distinction was intended to be set forth for the purposes of that case or for all time we need not here decide. In the cause *sub judice*, we find that section 5 of the law, conceded to be not subject to referendum, is clearly a condition upon the remaining sections of the law.[48]

Review of the history of the election day registration law's passage suggests that section five was not perceived by the drafters as a condition on the other sections. As noted earlier, the first four sections of the law make extensive changes in the state's election laws. Section five includes the appropriation of the entire biennial operating budget of the office of the Secretary of State. Obviously, election laws could not be implemented if the Secretary of State's office was not funded. This fact, does not, however, justify the conclusion that the budget provisions are a condition on the election reform provisions. As originally passed by the Ohio Senate, the law did not contain section five. It was added by the Senate after the bill was returned following passage by the House of Representatives. This action has led to repeated charges that the appropriation was added as an amendment solely for the purpose of avoiding a referendum on the issue of election day registration.[49] Moreover, as Chief Justice O'Neill pointed out in his dissent, the competitive bidding provision in *Donahey* was integrated into the law, whereas in *Brown*, the sections of the law were quite distinct and separable. Of this the chief justice said:

> Sections 1, 2, 3, and 4 of the Act in question here are totally unrelated to the appropriation of funds or procedures for their expenditure. Relators [and the majority] would have a 40 page Act of the General Assembly, amending numerous election laws, shielded from referendum

45. *Id.* at 166, 365 N.E.2d at 885 (O'Neill, C.J., dissenting).

46. *Id.* at 166, 365 N.E.2d at 885-86 (O'Neill, C.J., dissenting).

47. *Id.* at 155 n.2, 365 N.E.2d at 880 n.2.

48. *Id.*

49. *E.g.*, Leutz, *Ohioans Lose Right to Referendum*, Capital Law Forum (Capital University), November 1977, at 5.

because a part of Section 5 of the Act appropriates money for current expenses.[50]

From the foregoing analysis, it is evident that neither *Roose* nor *Donahey* supports the majority's conclusion in *Brown*. *Roose* suggests an opposite holding and the facts in *Donahey* are clearly distinguishable from those in *Brown*. Faced with a situation in which there was no binding precedent, the *Brown* court might reasonably have relied on the intent of the framers of the consitutional provision or policy considerations, to justify its holding. Instead, the court slighted them and chose to rely on doubtful precedent.

III. THE INTENT OF THE FRAMERS

The intent of the framers of the referendum provisions of the Ohio Constitution was dealt with by the Ohio Supreme Court in *Brown* only in a footnote.[51] In the footnote, the *Brown* majority responded to the argument raised by respondent that when some sections of a law do not come within the exceptions provided for by section 1d, those sections should not go into immediate effect and should be subject to referendum. To bring about this result, the court said, it would be necessary to redraft section 1d. Instead of reading as it does—"[l]aws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws . . . shall go into immediate effect"[52]—section 1d would have to say " 'sections of laws mentioned in this section shall not be subject to the referendum.' "[53] To so redraft the section, the majority asserted, "is outside the competence of this court."[54] The *Brown* majority reasoned:

> When the framers desired the Constitution to apply to sections of laws, as in Section 1c, they expressed that desire in plain language. Sections 1c and 1d were drafted and adopted at the same time, and we must assume that the framers intended the terms "laws" and "sections of laws" to have consistent meanings in both. It logically follows that since a law containing a section appropriating funds for current expenses of state government is a law mentioned in Section 1d, it is not a law subject to the referendum.[55]

A very literal reading of the Ohio Constitution might support the court's position. As Chief Justice O'Neill pointed out in his dissenting opinion, however, it is possible to distort meaning by being overly

50. 51 Ohio St. 2d at 166, 365 N.E. 2d at 886 (O'Neill, C.J., dissenting).
51. *Id.* at 154 n.1, 365 N.E.2d at 880 n.1.
52. OHIO CONST. art. II, § 1d.
53. 51 Ohio St. 2d at 154 n.1, 365 N.E.2d at 880 n.1.
54. *Id.*
55. *Id.*

literal.[56] In support of this view, the chief justice quoted the words of Judge Learned Hand:

> There is no more likely way to misapprehend the meaning of language —be it a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen.[57]

Judge Learned Hand's thought seems particularly appropriate in this case. The *Brown* court determined the intent of the framers without alluding to the attitudes of the Progressives who wrote the words. Earlier opinions of the Ohio Supreme Court, however, had given great weight to those attitudes when considering the meaning of the referendum provisions. In *State ex rel. Keller v. Forney*,[58] for example, the court pointed out that "great precaution [was] taken by the constitutional convention of 1912 to set forth and safeguard, with the particularity of detail usually found only in legislative acts, the right of referendum, and the three exceptions thereto . . . ."[59] Therefore, the court said, "our court should not deny the people that right [referendum] unless the act in question is plainly and persuasively included within one of the three classes excepted from the operation of the referendum."[60] The rule to be followed in interpreting the referendum provisions, according to the *Forney* court, is to give exceptions to the right of referendum "strict, but reasonable construction."[61]

In *Forney* the court acknowledged that the framers of the Ohio Constitution did not intend that the exception provisions could be used by the legislature to circumvent the constitutional guarantee of the right of referendum. Exceptions had been confined by the framers to only those essential to the efficient operation of government. Progressives who fought for direct legislation intended the referendum as a means of returning power to the electorate. They were suspicious of the legislature and intended that the referendum be used to overturn legislation passed in favor of special interests.

A further indication of the intent of the framers to safeguard, rather than limit, the right of referendum is to be seen in the wording of article II, section 1g of the Ohio Constitution. After setting out in

---

56. *Id.* at 166, 365 N.E.2d at 886 (O'Neill, C.J., dissenting).

57. *Id.* (O'Neill, C.J., dissenting) (quoting Central Hanover Bank & Trust Co. v. Comm'r, 159 F.2d 167, 169 (2d Cir. 1947)).

58. 108 Ohio St. 463, 141 N.E. 16 (1923). In *Forney*, the court was presented with the question whether the Taft Act, Act of April 30, 1923, 110 Ohio Laws 464 (1923), "[a]n act to revise and codify the laws relating to the levy of taxes," was excepted from the referendum as a "law 'providing for tax levies' " under article II, section 1d.

59. *Id.* at 467, 141 N.E. at 17.

60. *Id.* at 467-68.

61. *Id.* at 463, 141 N.E. at 16 (syllabus 1).

detail the mechanics of the referendum procedure, it concludes: "[t]he foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the power herein reserved."[62] This language is intended, the Ohio Supreme Court said in *Shryock v. Zanesville*,[63] to make it impossible for the legislature to "cripple or destroy" the right of referendum.[64]

Preservation of the right of referendum was obviously of great importance to the framers of the referendum provisions and to the courts that interpreted those provisions in the years following their adoption. The *Brown* court ignored these attitudes and focused instead on the exact wording of the provisions. As a consequence of this literal reading of the constitution, a holding was reached that puts no limits on the power of the legislature to include excepted provisions in laws otherwise subject to referendum. It will allow the exception provisions of the referendum section of the Ohio Constitution to take precedence over the granting provisions, a result clearly contrary to what the framers intended. The result may be that the right of referendum will be overcome by the ability of the legislature to bring most laws within the exceptions to that right by adding a section that includes "an appropriation for the current expenses of state government."

IV. Policy Considerations

Despite the fact that it was dealing with a potential limitation on a constitutionally guaranteed right, the Ohio Supreme Court in *Brown* failed to discuss the policy considerations that should have been considered in interpreting the constitution. The court gave the constitution the narrowest possible reading and distorted prior cases in order to support that reading, while ignoring the policy considerations that favored an opposite result. The *Brown* decision not only overlooks the importance of proceeding cautiously in construing the constitution, but also removes an important check on the ability of the legislature to enact laws favoring special interests.

Chief Justice O'Neill, in his dissenting opinion, charged that "[t]he people's constitutional right of referendum is one of the bedrocks of democracy, yet the approach of the majority appears to manifest more concern for its circumvention that [*sic*] for its preservation."[65] This charge finds substance in the failure of the *Brown* majority to consider the intent of the framers of the referendum provisions before

62. Ohio Const. art. II, § 1g.

63. 92 Ohio St. 375, 110 N.E. 937 (1915).

64. *Id.* at 382, 110 N.E. at 939.

65. 51 Ohio St. 2d at 158, 365 N.E.2d at 881 (O'Neill, C.J., dissenting).

giving those provisions an eviscerating interpretation. Justice Brown, who wrote a separate dissent, saw this laxness in constitutional interpretation as a threat not only to the right of referendum, but to the constitution itself:

> From today forward, the people's constitutional right to referendum has been abolished, or at the very least, diminished to a mere privilege to be granted by the General Assembly in only those instances where a referendum would not pose a serious threat to the legislation. The approval of this scheme by a majority of this court marks the beginning of the demise of constitutional government in Ohio.[66]

Justice Brown's warning, though perhaps overstated, is echoed in the dissenting opinion of Justice Herbert, who saw the decision as the end of the referendum and the loss of an important part of the state's system of checks and balances. "By its decision today," he said, "the majority has all but swept away the ultimate check upon one of those branches of the government: the people's constitutional right to legitimately strike down legislation with which they might strongly disagree."[67] Justice Herbert's assessment of the importance of the referendum parallels that of a much earlier opinion of the Ohio Supreme Court. In *State ex rel. Nolan v. ClenDening*,[68] a 1915 decision, Judge Wanamaker saw the deterrent power of the referendum as its greatest significance:

> The potential virtue of the "I. & R." [initiative and referendum] does not reside in the good statutes and good constitutional amendments initiated, nor in the bad statutes and bad proposed constitutional amendments that are killed. Rather, the greatest efficiency of the "I. & R." rests in the wholesome restraint imposed automatically upon the general assembly and the governor and the possibilities of that latent power when called into action by the voters.[69]

Hoyt Langdon Warner, in his study of Progressivism in Ohio, confirmed the reasoning of Judge Wanamaker. "The referendum," he said, "has been employed to defeat objectionable laws and has no doubt acted as a brake on unscrupulous attempts at legislation by special interests."[70] In a similar vein, Carl Wittke's history of Ohio considers the referendum at length and concludes:

> The adoption of the initiative and referendum placed legislative power more directly in the hands of the voters. While a number of specific constitutional limitations were imposed on its exercise, the net result was a great potential increase in popular control of government. Subsequent events were to demonstrate that it was not to be used as widely as many of its proponents hoped, or its opponents feared. Never-

66. *Id.* at 168-69, 365 N.E.2d at 887 (Brown, J., dissenting).

67. *Id.* at 168, 365 N.E.2d at 887 (Herbert, J., dissenting).

68. 93 Ohio St. 264, 112 N.E. 1029 (1915).

69. *Id.* at 277-78, 112 N.E. at 1032.

70. H. WARNER, *supra* note 10, at 486.

theless, it created an instrument which the people could use to exercise direct control over their government.[71]

By limiting the right of referendum, the *Brown* decision has removed the restraint on the legislature that that right imposed. This consideration should certainly have weighed against the holding the court reached. In deciding *Brown*, the court was determining not only whether a referendum could be had on the issue of election day registration,[72] but also whether the legislature was to be empowered to circumvent the people's right of referendum in the future. Unfortunately, the court chose to be swayed by doubtful precedent rather than important policy considerations.

V. CONCLUSION

There can be little doubt that the *Brown* decision has severely limited the right of Ohio voters to demand popular referenda on legislative acts. At least theoretically, this situation could be overcome by amending the Ohio Constitution to strengthen the right of referendum. This possibility seems unlikely for the present, however, because there does not appear to be any public awareness of the significance of the *Brown* decision. Until there is such an awareness and a movement for reform, it is evident that whenever the general assembly wishes to avoid a referendum, it can do so by adding a current appropriation to any act likely to be challenged. This result was neither mandated by the law nor justified as a matter of public policy.[73]

There has not been sufficient time to determine what the eventual result of the *Brown* decision will be. Whether legislators will take advantage of the decision is yet to be seen. Nonetheless, it is obvious that the control over the legislature which the referendum provided and for which the Progressives fought, has been severely eroded by the decision of the Ohio Supreme Court in *Brown*.

---

71. 6 C. WITTKE, *supra* note 9, at 13.

72. Opponents of election day voter registration, precluded from demanding a referendum, used the initiative provisions of article II, § 1a of the Ohio Constitution to propose a constitutional amendment providing for voter registration at least thirty days prior to an election. The initiative procedure requires signatures of ten per cent of the electorate while the referendum procedure requires signatures of only six per cent. Nonetheless, the petition drive succeeded and the amendment was placed on the ballot in the November 8, 1977 general election. It passed by a substantial majority. Columbus Dispatch, Nov. 9, 1977, § A at 1, col. 1.

73. *See* State *ex rel.* Riffe v. Brown, 51 Ohio St. 2d 149, 158, 365 N.E.2d 876, 881 (1977) (O'Neill, C.J., dissenting).

Shelagh C. Baker